TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. ~~396~~. 161

JOHN RIGGIN, PLAINTIFF IN ERROR,

vs.

JOHN MAGWIRE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED NOVEMBER 22, 1871.

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1 STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the first day of October, A. D. 1870, there was filed in the office of the clerk of the supreme court, held at St. Louis, of the State of Missouri, a transcript of the record and proceedings in a certain cause lately pending in the St. Louis circuit court, which transcript is in the words and figures following, to wit:

STATE OF MISSOURI, *County of St. Louis, ss:*

Be it remembered that, heretofore, to wit, on the 13th day of January, A. D. 1869, there was filed in the office of the clerk of the circuit court of St. Louis County, a petition, which is in words and figures following, to wit:

Petition.

In the circuit court for St. Louis County. February term, 1869.

JOHN MAGWIRE, PLAINTIFF, *vs.* JOHN RIGGIN, DEFENDANT. } St. Louis County, ss.

The plaintiff states that, on the 2nd day of December, 1839, the defendant, by his deed of that date, duly executed, acknowledged, and recorded, which deed plaintiff here brings into court, for a valuable consideration therein named, did grant, bargain, and sell, convey,
2 and confirm in fee-simple, to one Verpasian Ellis, a certain parcel of land situated about two and one-quarter miles north of the city of St. Louis, on the Bellefoutaine road, beginning in said road at a point three chains and twenty-five links from P. Salisbury's northwest corner; thence N. 68° 15′ east, or parallel with said Salisbury's north and south boundary lines to a point in the middle of the channel of Gingras Creek; thence up said creek to the southeast corner of Dicharson's land; thence S. 68° 15′ W., or parallel with said Salisbury's line aforesaid, and along and with said Dicharson's southern boundary line to a point in the aforesaid road; thence southerly in said road, along and with B. G. Farrar's eastern line to the place of beginning, containing five and one-half arpens; the said tract being bounded on the north by Dicharson's land, and on the south by nine and one-half arpens, conveyed to B. P. Smith: To hold the same, with the appurtenances, to said Verpesian Ellis, and his heirs and assigns forever. And in and by said deed, the said defendant, among other things, covenanted with the said Verpesian Ellis and his heirs and assigns, that he, the defendant, was, at the time he executed said deed, seized of an indefeasible estate, in fee-simple, in the parcel of land conveyed as aforesaid, and in every part thereof; and said Ellis forthwith entered into possession of said premises.

The plaintiff further states that the said Verpesian Ellis, afterwards,
3 on the 20th day of May, 1842, by his deed of trust, of that date duly executed, acknowledged, and recorded, which deed, not being in the possession, custody, or control of the plaintiff, he is unable to produce in court, for a valuable consideration therein mentioned, bargained, sold, and conveyed the above-described premises to one Daniel D. Page, jointly with one Aaron H. Hackney, in trust, to secure the payment of a debt therein described, payable to one Louis A. Benoist, by the said Verpesian Ellis. That said Daniel D. Page and Aaron H. Hackney,

afterwards, in pursuance of the terms of said deed of trust, on the 14th day of June, 1843, by their joint deed of that date, (which deed plaintiff here produces in court, and is duly executed, acknowledged, and recorded,) bargained, sold, and conveyed for a valuable consideration mentioned therein, the said above-described premises, to the plaintiff and his heirs and assigns; and afterwards, on the same day, plaintiff entered into possession of said premises.

The plaintiff further states that, relying upon the covenant of the defendant, contained in the deed first above-mentioned, he, the plaintiff, afterwards, on the 25th day of May, 1857, by his deed of that date duly executed, acknowledged, and recorded, (which deed, not being in the possession, custody, or control of the plaintiff, he is unable to here produce in court,) for a valuable consideration in said deed mentioned, he, the plaintiff, did grant, bargain, and sell, in fee-simple, to one John Elliott, a parcel of the premises above described, being lot number fifteen, in block number one, of John Magwire's 1st addition
4 to the city of St. Louis, containing twenty-five feet front on Magwire Market-place, south side, by ninety-three feet in depth: To hold the same, with the appurtenances, to him, the said John Elliott, and his heirs and assigns forever. And in and by said deed, the plaintiff, among other things, covenanted with the said John Elliott, and his heirs and assigns, that he, the plaintiff, was, at the time he executed said conveyance, seized in an indefeasible estate, in fee-simple, in the said premises conveyed; that the said John Elliott, afterwards, on the day last aforesaid, entered into possession of said lot of land; but that the plaintiff was not, at the time he executed said deed, in fact seized in an indefeasible estate, in fee-simple, in said lot; but, on the contrary, plaintiff alleges that one Margaret Thomas, lawfully claiming her dower in the same by a title older and better than the title of the defendant and of the plaintiff, did, afterwards, by the consideration of the circuit court of St. Louis County, begun and holden on the term thereof, 186', recover judgment against the said John Elliott for the value in damages of her said dower, being the sum of dollars damages, and her costs of suit, amounting in all to the sum of eighty-one $\frac{15}{100}$; for which execution issued against said John Elliott; which said execution the sheriff of St. Louis County threatened to levy and collect of the goods and estate of said John Elliott; and the plaintiff, by reason of his said covenant with said Elliott, was liable and compelled to pay the amount of said execution, and on the day of , 1868,
5 plaintiff did pay the same, being the sum of eighty-one $\frac{15}{100}$ dollars.

Plaintiff further states that, relying upon the covenant of the defendant contained in the deed first above-mentioned, he, the plaintiff afterwards, on the said 25th day of May, 1857, by his deed of that date, duly executed, acknowledged, and recorded, (which deed not being in the possession, custody, or under the control of the plaintiff, he is unable to produce here in court,) for a valuable consideration therein named, he, the plaintiff, did grant, bargain, and sell in fee-simple, to one Carl H. Schrage, a certain other parcel of the said premises, first above described, being lots numbered twenty-one and twenty-two, each having a front of twenty-five feet on the south side of Magwire Market-place by a depth of ninety-three feet, both said lots being in block number one, of John Magwire's 1st addition to the city of St. Louis: To hold the said lots, with the appurtenances to him, the said Schrage, and his heirs and assigns forever. And in and by said deed, the plaintiff, among things, covenanted with the said Schrage and his heirs and assigns that he, the

plaintiff, was, at the time he executed said conveyance seized in an indefeasible estate in fee-simple in said lots conveyed; that said Carl H. Schrage, afterwards, on the same day last aforesaid, entered into the possession of said lots of land, but he, the plaintiff was not in fact, at the time he executed said conveyance seized in an indefeasible estate in fee-simple in said lots of land; but, on the contrary, plaintiff, alleges that one Marga-
6 ret Thomas, lawfully claiming her dower in the said lots of land by a title older and better than the title of the defendant, and of the plaintiff, did, afterwards, by the consideration of the circuit court begun and holden on the term thereof, 186 , recover judgment against the said Carl H. Schrage for the value in damages of her said dower, being the sum of dollars damages, and her costs of suit, all together amounting to the sum of ninety $\frac{15}{100}$ dollars; for which execution issued against said Carl H. Schrage to be levied of his goods and estate, which execution the sheriff of St. Louis County threatened to so levy and collect; and the plaintiff, by reason of his said covenant with said Schrage, was liable and compelled to pay the amount of said execution, and on the day of , 1868, plaintiff did pay the same in the sum of ninety $\frac{15}{100}$ dollars.

The plaintiff further states that, relying upon the covenant of the defendant contained in the deed first above-mentioned, he, the plaintiff, afterwards, on the 25th day of May, 1857, by his deed of that date, duly executed, acknowledged, and recorded, (which deed not being in the possession, custody, or control of plaintiff, he is unable to produce here in court,) for a valuable consideration in said deed mentioned, he, the plaintiff, did grant, bargain, and sell, in fee-simple to one Samuel Spencer, a certain other parcel of the premises first above-described, being lots numbered twelve and thirteen, in block number one, of John Magwire's
1st addition to the city of St. Louis, said lots having an aggregate
7 front of fifty-three feet on the south side of Magwire's Market-place, by a depth of ninety-three feet: To hold the said lots, with the appurtenances, to him, the said Samuel Spencer, and his heirs and assigns forever. And in, and by said deed the plaintiff, among other things, covenanted with the said Samuel Spencer, and his heirs and assigns, that he, the plaintiff, was, at the time he executed said conveyance, seized in an indefeasible estate in fee-simple in said lots conveyed; that afterwards said Samuel Spencer, on the same day last aforesaid, entered into possession of said lots of land, but that he, the plaintiff was not, in fact, at the time he executed said conveyance, seized in an indefeasible estate in fee-simple in said lots of land; but, on the contrary, plaintiff alleges that one Margaret Thomas, lawfully claiming her dower in said lots of land, by a title older and better than the title of the defendant, and of the plaintiff, did, afterwards, by the consideration of the circuit court of St. Louis County, begun and holden on the term thereof, 186 , recover judgment against the said Samuel Spencer for the value in damages of her said dower, being the sum of dollars damages, and her costs of suit, all together amounting to the sum of ninety-four dollars and fifteen cents; for which execution issued against said Samuel Spencer,
8 and which execution the sheriff of St. Louis County threatened to levy and collect of the goods and estate of said Spencer; and the plaintiff by reason of his said covenant with the said Spencer, was liable, and compelled to pay the amount of said execution, and on the day of 1868, plaintiff did pay the same, being ninety-four $\frac{15}{100}$ dollars.

The plaintiff alleges that, at the time the defendant executed the conveyance first above-mentioned and described, the defendant was not in

fact seized of an indefeasible estate in fee-simple in the premises conveyed thereby; but, on the contrary, one Margaret Thomas was the lawful owner of a dower interest or estate in said premises, by a title older and better than the title of the defendant thereto, and by reason of the said covenant of defendant contained in the aforesaid deed to Ellis, and also by reason of the premises hereinbefore contained, an action hath accrued to the plaintiff to have and recover from the defendant the several sums paid by the plaintiff as aforesaid, on account of the said dower estate in the several lots acquired and owned by said Elliott and Schrage and Spencer, as aforesaid; for all which with interest and costs, the plaintiff prays judgment.

By his attorneys,

HARDING & CRANE.

9 Upon which petition a summons issued, directed to the sheriff of St. Louis County, in words and figures following, to wit:

Summons.

COUNTY OF ST. LOUIS, *ss:*

The State of Missouri to the sheriff of St. Louis County, greeting:

We command you to summon John Riggin to appear before the judges of our circuit court, on the first day of the next term thereof, to be held in the city of St. Louis, within and for the county of St. Louis, on the first Monday of February next, then and there to answer the complaint of John Magwire, as set forth in the annexed petition, and have you then and there this writ.

Witness John Lewis, clerk of our said court, with the seal thereof hereto affixed at office, in the city of St. Louis, this 13th day of January, in the year of our Lord eighteen hundred and sixty-nine.

[SEAL.] JNO. LEWIS, *Clerk.*

Upon the back of which summons the sheriff made return as follows, to wit:

Sheriff's return.

Executed this writ in St. Louis County, on the 16th day of January, 1869, by leaving a copy of the writ and petition, as furnished by the clerk, at the usual place of abode of John Riggin, with a white person of his family, over the age of fifteen years.

JOHN MCNEIL, *Sheriff.*

10 To which petition, on the 8th day of April, A. D. 1870, the following amended answer was filed, to wit:

Amended answer.

In the circuit court of St. Louis County. February term, 1869. County of St. Louis, ss:

JOHN MAGWIRE
vs.
JOHN RIGGIN.

The defendant, for amended answer, herein denies that, on the 2nd day of December, 1839, he did, by his deed of that date, grant, bargain, and sell, convey and confirm, in fee-simple, to Vespesian Ellis, the parcel of land in said petition described, or that said defendant covenanted with

said Ellis for the consideration therein mentioned, in the manner stated in said petition.

For further answer, defendant denies that the plaintiff, in his sale of the property described in the petition, to John Elliott, relied upon the covenant mentioned in said petition.

For further answer, defendant denies that the plaintiff, in the sale of the property described in the petition, to Carl H. Schrage, relied upon the covenant mentioned and described in said petition.

For further answer, defendant denies that the plaintiff, in the sale of the property described in the petition, to Samuel Spencer, relied upon the covenant mentioned and described in the said petition.

And defendant denies that Margaret Thomas, lawfully claim-
11 ing her dower in said property described in the petition, or by a title older or better than the title of defendant and plaintiff, by the consideration of the circuit court of St. Louis County, at the times stated in said petition, did recover judgment against the parties mentioned in said petition for value, in damages, of her said dower, in the sums therein stated, and avers that said Margaret Thomas never had her dower in said premises assigned to her according to law.

For further answer, defendant denies that, at the time of the execution of the conveyance first mentioned in the petition, he was not seized of an indefeasible estate in fee-simple in the aforesaid premises, and denies that Margaret Thomas was the lawful owner of a dower, interest, or estate in said premises by a title older and better than the title of the defendant thereto, or by reason of the facts stated in said petition, an action has accrued to the plaintiff to have or recover from defendant the sums of money paid by him as alleged in the petition, and avers that plaintiff was never compelled or had any right to pay said sums mentioned in his petition.

For further answer, defendant avers that this action was not brought within ten years after the cause of action accrued herein.

Defendant, for further answer, states that, subsequent to the alleged execution of the deed in said petition mentioned, to wit, on the 13 of June, 1843, the defendant, then a resident of the city of St. Louis, Missouri, and within the jurisdiction of the district court of the
12 United States for the district of Missouri, and being then and there a bankrupt within the true meaning of the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved August 19, 1841, and then and there owing debts which had not been created in consequence of a defalcation as a public officer, or as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, presented to said district court of the United States of America for the said district, the said court then being held at Jefferson City, in the aforesaid district, his petition setting forth a list of his creditors and liabilities, and the respective places of residence of his said creditors, and the amounts due to each, together with an accurate account of his property, rights, and credits, according to law; which petition was duly verified, and he having prayed to be declared a bankrupt pursuant to the provisions of said act, and said petition being then and there received and filed by said court, such proceedings were had thereon, that afterwards, and on the 13th day of June, 1843, by said court, a decree was duly made and entered upon said petition, by which it was adjudged and decreed that this defendant be discharged from all the debts owing at the time of the filing of his said petition, a duly-authenticated copy of said discharge or certificate of discharge in bankruptcy is herewith filed, marked "Ex-

hibit A;" that the supposed indebtedness set up in the petition accrued before the filing of said petition in bankruptcy, and was
13 not, nor was any part thereof created in consequence of a defalcation as a public officer, executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, whereby defendant was discharged from any indebtedness, if any there was, under said covenant mentioned in petition.

Wherefore he prays to be dismissed with his costs.

By GARECHÉ & MEAD, *his att'ys.*

The exhibit, marked "A," above referred to as filed therewith is as follows, to wit:

EXHIBIT "A."

In the district court of the United States for the district of Missouri, June 13, A. D. 1843.

IN THE MATTER OF JOHN RIGGIN, bankrupt. } Case No. 128. In bankruptcy.

And now, at this day, came on to be heard the petition of the said John Riggin, and, it appearing to the court that said petitioner has fully conformed to the rules and orders of the court as well as the acts of Congress in such cases made and provided, it is therefore ordered, adjudged, and decreed by the court, that said John Riggin be, and is hereby, discharged from all his debts by him owing at the time of filing his petition for bankruptcy. And it is further ordered that a certificate thereof in due form be delivered to said petitioner.

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, Adams Peabody, clerk of the United States district court for the western district of Missouri, do hereby certify that the foregoing
14 is a true copy of the decree in bankruptcy made in the matter of John Riggin, (case No. 128,) in the district court of the United States for the district of Missouri, on the 13th day of June, A. D. 1843, as appears from the records of said court in the custody of and now in this office.

In witness whereof I hereunto subscribe my name and affix the seal of the court last aforesaid, at office in the city of Jefferson, in said western district of Missouri, this 1st day of February, A. D. 1869.

[SEAL.] ADAMS PEABODY,
Clerk of District Court for said District.

[5-cent stamp.]

To which amended answer, on the 8th day of April, A. D. 1870, the following reply was filed, to wit:

Reply.

Court No. 3. The circuit court of St. Louis County. Case No. 11620.

JOHN MAGWIRE, PLAINTIFF,
vs.
JOHN RIGGIN, DEFENDANT.

The plaintiff comes and replies to the new matter set up in defend-

ant's amended answer to the petition in the above cause, and says that. Margaret Thomas did, before the institution of this suit, have her dower assigned to her in the premises involved in this case, according to law; and also that plaintiff was bound to pay the value of said dower and costs in the sums stated in the petition, and did so pay the same as stated.

15 Plaintiff says that the cause of action herein did accrue within ten years next preceeding the institution of this suit.

The plaintiff also says that the right to dower by said Margaret Thomas in question accrued to her in virtue of the former ownership and seizure thereof of Martin Thomas, the husband of said Margaret, and that, at the date of defendant's act and discharge in bankruptcy pleaded in said answer, the said Martin Thomas was living, and no right to such dower had accrued to said Margaret.

Wherefore plaintiff as of his petition prays judgment, &c.

HARDING & CRANE, *For Pl'ff.*

And at a special term of said court, being at the April term, A. D. 1870, the following proceedings were had in said cause, to wit:

Judgment.

FRIDAY, *May 6th*, 1870.

JOHN MAGWIRE
vs.
JOHN RIGGIN.

Now, at this day, come said parties, by their respective attorneys, and no jury being required by either party, this cause is tried by the court upon the pleadings herein, and the evidence and proofs adduced, and the court, having heard, and being fully advised of and concerning the premises, doth find the issues herein for the plaintiff, and that the defendant is indebted to the plaintiff in the sum of two hundred and eighty-six dollars and five cents.

Wherefore it is considered by the court that the plaintiff recover

16 of the defendant the debt aforesaid in form aforesaid as found, and also his costs and charges herein expended, and have execution therefor. Instruction filed.

Motion for new trial overruled.

FRIDAY, *May 13th*, 1870.

Now, at this day, the motion heretofore filed in this cause for a new trial is submitted to the court, and the court, being fully advised of and concerning the premises, doth order and adjudge that said motion be overruled.

Appeal granted to general term.

MONDAY, *May 23rd*, 1870.

Now, at this day, there is filed in this cause a bill of exceptions, and thereupon, on motion of the defendant, by attorney, it is ordered by the court that an appeal to the general term be granted the defendant from the judgment herein rendered.

Which bill of exceptions is in words and figures following, to wit:

Bill of exceptions at special term.

In the circuit court of St. Louis County.

JOHN MAGWIRE
vs.
JOHN RIGGIN.

Be it remembered that, at special term of said court, this cause came on to be heard, and the parties waiving a jury, it was submitted to the court on an agreed statement of facts, as follows:

17 *Agreed state. of facts.*

No. 11620. Room 3. The c'r. c'rt of St. Louis County.

JOHN MAGWIRE, PLAINTIFF,
vs.
JOHN RIGGIN, DEFENDANT.

For the purpose of the trial of the above cause the parties, plaintiff *plaintiff* and defendant, do hereby agree that the following are facts which may be used in evidence therein without objection, viz: That the defendant, on the 2nd day of December, 1839, executed and delivered to Vespesian Ellis a deed as recorded in book L^2, page 143, of the records in the recorder's office for St. Louis County, and that the consideration mentioned in said deed was duly paid and discharged according to the terms of said deed, and that said Ellis forthwith took possession of the premises therein conveyed under said deed.

Deed from John Riggin & wife to V. Ellis.

This deed made this second day of December, eighteen hundred and thirty-nine, by and between John Riggin and Anne Riggin, his wife, party of the first part, of the county of St. Louis, and State of Missouri, and Vespesian Ellis, of Accomack County, State of Virginia, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar to them paid, and the indebtedness hereinafter stated, have granted, bargained, and sold, and do hereby grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns forever, a certain tract or parcel of land situated about two and a quarter miles north of the city of St. Louis, on the
18 Bellefontaine road; beginning in said road at a point three chains and twenty-five links from P. Salisbury's northwest corner; thence N. 68° 15′ east, or parallel with said Salisbury' north and south boundary lines to a point in the middle of the channel of Gingrass Creek; thence up said creek to the southeast corner of Dirharson's land; thence S. 68° 15′ west, parallel with said Salisbury's lines aforesaid, and along and with said Dirharson's southern boundary line to a point in the aforesaid road; thence southwardly in said road along and with B. G. Farrar's eastern line to the place of beginning, containing five and a half arpens; the said tract being bounded on the north by Dirharson's land, on the south by nine and a half arpens conveyed to B. P. Smith: To have and to hold the said tract of five and a half arpens with the appurtenances thereto belonging, to said Vespesian Ellis, his heirs and assigns forever, subject, nevertheless, to the payment of certain notes, altogether amounting to 1,670 $\frac{40}{100}$ dollars, and due and payable during the years 1845, 1846, & 1847; more particularly

described in a mortgage deed from V. Ellis, recorded in book G, number 2, pages 242, 243, & 244, on a tract of 15 arpens of land of which this is a part, the balance of the 15 arpens aforesaid having been released from the effect of said mortgage, by a deed of release of even date herewith in such proportion and manner as is therein specified.

In testimony whereof the parties of the first part have hereto set their hands and affixed the' seals the day and year first herein above written.

19 JOHN RIGGIN. [SEAL.]
ANNE RIGGIN. [SEAL.]

Witness:
BENJ. F. MCKENNEY.

STATE OF MISSOURI, *County of St. Louis, ss:*

Be it remembered that, on this ninth day of March, eighteen hundred and forty, before the undersigned Benjamin F. McKenney, a justice of the peace within and for the county aforesaid, came John Riggin and Anne Riggin, his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing, as parties thereto, and severally acknowledged the same to be their act and deed, for the purposes therein mentioned; and she, the said Anne Riggin, being, by me first made acquainted with the contents thereof, acknowledged, on an examination apart from her husband, that she executed the same and relinquishes her dower in the real estate therein mentioned freely and without compulsion or undue influence of her said husband.

Taken and certified the day and year aforesaid.

BENJ. F. MCKENNEY, *Justice.*

Filed for record March 9th, 1840, and recorded March 25th, 1840.

JNO. ROLAND, *Recorder.*

STATE OF MISSOURI, *County of St. Louis, ss:*

I, the undersigned, recorder for said county, certify the foregoing to be a full and complete copy of an instrument of writing, and also of the certificate of acknowledgment and of the dates of filing and of re-
20 cording thereof, as fully as the same remains recorded in my office, in book L No. 2, pages 143 & 144.

Witness my hand and official seal, at St. Louis, the 14th day of September, A. D. 1848.

[SEAL.] S. D. BARLOW, *Recorder.*

That the plaintiff became the owner and took possession of the same premises, on the 14th day of June, 1843, by virtue of conveyances under and by said Ellis, and that plaintiff's title is correctly stated in the petition of plaintiff.

That, afterwards, plaintiff sold and conveyed seperate parcels from the aforesaid premises, severally to John Elliott and to Carl H. Schrage and to Samuel Spencer, at the times and quantities and with the covenants alleged in the petition of plaintiff; and that each, said Elliott, Schrage, and Spencer, forthwith entered into possession of the parcels so sold to them, respectively.

That during his coverture with his wife, Margaret Thomas, previous to the 2nd day of December, 1839, aforesaid, one Martin Thomas was siezed of an estate of inheritance, in the premises described in the deed of defendant to Ellis, above mentioned, under a title elder and better

than the defendant's title to said premises; that said Martin Thomas died September 13, 1848, leaving said Margaret, his widow; that said Margaret Thomas had never relinquished her dower in said premises nor had her dower ever been assigned to her from and in said
21 premises; that, afterwards, in the year 1868, said Margaret Thomas, by the consideration and judgment of the circuit court of St. Louis County, recovered the several judgments stated in the plaintiff's petition against said Elliott, and said Schrage, and said Spencer, for her damages for the detention by them severally of her said dower interest, and the yearly value of her dower in the said parcels acquired by them from the plaintiff, and for her costs, and in the sums stated in the petition. That, afterwards, the same year, 1868, said Margaret Thomas sued out of said court executions to enforce her said judgments against plaintiff's said grantees, Elliott, Schrage, and Spencer, and that, before the institution of this said suit, the plaintiff paid said executions to the sheriff of the county of St. Louis and in the sums therein stated. That the defendant, having duly instituted all proceedings *ac*quired by law for that purpose, was, on the 13th day of June, 1843, by the district court of the United States for the district of Missouri, discharged from all his debts and liabilities, as fully and completely as said court could discharge in bankruptcy, under the terms and provisions of an act of Congress entitled, "An act to establish a uniform system of bankruptcy throughout the United States," approved August 19, 1841.

It is agreed that plaintiff may read in evidence a certified copy of defendant's deed to Vespesian Ellis, dated Dec'r 2nd, 1839, and that either party may introduce evidence, written or oral, in addition to the foregoing, without objection.

GARESCHÉ & MEAD,
Def't's Att'ys.
22 HARDING AND CRANE,
Att'ys for Pl'tf'.

The defendant then asked the court to give the following instruction:

The court declares the law to be that, under the facts agreed to by the agreed statement of facts herein, the defendant is entitled to judgment.

Defendant's instruction refused.

Which the court refused; to which refusal defendant then and there excepted.

The court then rendered judgment in said cause for the plaintiff, and to the action of the court in rendering said judgment, defendant then and there excepted.

And defendant afterwards made and filed his motion to set aside said judgment, and grant him a new trial of said cause.

Motion for new trial.

In the circuit court of St. Louis County.

JOHN MAGWIRE }
vs.
JOHN RIGGIN. }

The defendant moves the court to set aside the judgment herein and

grant him a new trial, because the judgment is against the law, the evidence, and the weight of evidence; because the judgment should have been in favor of the defendant, and because the court refused proper and legal instructions offered by defendant.

GARESCHÉ & MEAD,
Def'ts Attorneys.

23 Which motion, coming on to be heard, was by the court overruled; to which action of the court overruling said motion, defendant then and there duly excepted, and in due time presents this his bill of exceptions, and prays the court to allow, and sign and seal the same, which is done, and that an appeal be granted him to general term; and all of which is by the court so ordered.

JAMES K. KNIGHT, *Judge.* [SEAL.]

And, at a general term of said court, being at the said April term, A. D. 1870, the following further proceedings were had in said cause, to wit:

Judgment at special term affirmed, and appeal granted to supreme court.

SATURDAY, *May 28th*, 1870.

JOHN MAGWIRE
vs.
JOHN RIGGIN.

Now come the parties, by their respective attorneys, and the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the court at special term be, and the same is in all things hereby, affirmed, at the costs of the defendant, and that execution issue therefor. Whereupon, the defendant, by his attorney, files a bill of exceptions, and also an affidavit for an appeal, and on his motion and appeal is allowed him to the supreme court from the judgment herein rendered. Bond waived.

Which bill of exceptions and affidavit for appeal are in the words and figures following, to wit:

24 *Bill of exceptions at general term.*

In the St. Louis circuit court.

JOHN MAGUIRE
vs.
JOHN RIGGIN.

Be it remembered that, this cause coming on to be heard by the general term of this court on appeal from special term, the judgment of the special term was affirmed; to which judgment of affirmance the defendant excepted, and files this his bill of exceptions, which he prays may be signed, sealed, and made part of the record; which is done this day of May, 1870.

R. E. ROMBAUER, [SEAL.]
Presiding Judge.

Affidavit for appeal.

In the circuit court of St. Louis County.

JOHN MAGWIRE
vs.
JOHN RIGGIN.

John Riggin, the above-named defendant, being duly sworn, says that the appeal in the above cause is not made for vexation or delay, but because the affiant believes that he, appellant, is aggrieved by the judgment or decision of this court.

JOHN RIGGIN.

Sworn to and subscribed before me this 28th May, 1870.
Witness my hand and notarial seal the day and date aforesaid.
[SEAL.] EUGENE RIGGIN,
Notary Public St. Louis Co., Mo.

Certificate.

STATE OF MISSOURI,
County of St. Louis, ss:

I, John Lewis, clerk of the circuit court within and for the county of St. Louis, hereby certify the foregoing to be a full, true, and
25 complete transcript of the record and proceedings had in the above-entitled cause, as fully as the same remains on file in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office in the city of St. Louis, this 15th day of June, A. D. 1870.

[SEAL.] JOHN LEWIS, *Clerk.*

And at a supreme court held at St. Louis, of the State of Missouri, being at the March term, A. D. 1871, thereof, the following proceedings were had in said cause, to wit:

Cause submitted.

TUESDAY, *April* 4, 1871.

JOHN MAGWIRE, RESPONDENT,
vs.
JOHN RIGGIN, APPELLANT.

Now come the parties, by their attorneys, and submit this cause to the court upon their brief.

Appellant's brief, and statement and brief of respondent filed.

And, afterwards, at the same term of said court, the following judgment was rendered in said cause, to wit:

Judgment of St. Louis circuit court affirmed.

Appeal from St. Louis circuit court.

MONDAY, *April* 17, 1871.

JOHN MAGWIRE, RESPONDENT,
vs.
JOHN RIGGIN, APPELLANT.

26 Now again come the parties aforesaid, by their respective attorneys, and, the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said St. Louis circuit court, be in all things affirmed, and stand in full force and effect, and that the said respondent recover of the said appellant his costs and charges herein expended, and have execution therefor.

Opinion filed.

And, afterwards, at the same term of said court, the following further proceedings were had in said cause, to wit:

Writ of error from Supreme Court of the United States.

MONDAY, *May* 8, 1871.

JOHN MAGWIRE, RESPONDENT,
vs.
JOHN RIGGIN, APPELLANT.

Now again comes the appellant, by his attorneys, and files a writ of error from the Supreme Court of the United States in this cause; which is allowed.

Citation filed.

Bond filed and approved.

Which bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, John Riggin, as principal, and John Riggin, jun., as security, are held and firmly bound unto John Magwire in the full and just sum of two thousand dollars, to be paid to the said John Magwire, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these
27 presents, sealed with our seals, and dated this seventh day of May, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately at the March term, A. D. 1871, of the supreme court of the State of Missouri, in a suit depending in said court between John Magwire, plaintiff, and John Riggin, defendant, judgment was rendered against the said John Riggin, defendant, as aforesaid; and the said John Riggin having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John Magwire, plaintiff, as aforesaid, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said John Riggin shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

JOHN RIGGIN. [SEAL.]
JNO. RIGGIN, JR. [SEAL.]

Approved by—

P. BLISS,
Pres'd'g Justice S. C. of the State of Missouri.

(Endorsed:) John Magwire, resp., vs. John Riggin, ap'l't. Bond. Filed May 8th, 1871. Francis Minor, clerk, per Jos. F. Baier, D. C.

28 STATE OF MISSOURI, *ss:*

I, Francis Minor, clerk of the supreme court, held at St. Louis, of the State of Missouri, certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings had in the above-entitled cause as fully as the same remains of record and on file in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office in the city of St. Louis, this twelfth day of August, A. D. 1871.

[SEAL.] FRANCIS MINOR, *Clerk*,
Per JOS. F. BAIER, *D. C.*

29 The United States of America to John Magwire, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein John Riggin is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Philemon Bliss, presiding justice of the supreme court of the State of Missouri, this sixth day of May, in the year of our Lord one thousand eight hundred and seventy-one.

P. BLISS, *P. J.*

30 We hereby acknowledge due & proper service of the within citation.

HARDING & CRANE,
Attorneys for Jno. Magwire.

(Indorsed:) John Magwire, resp., vs. John Riggin, ap'l't. Citation. Filed May 8, 1871. Francis Minor, clerk, per Jos. F. Baier, D. C.

31 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of the State of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, at the

March term thereof, A. D. 1871, between John Magwire, plaintiff, and John Riggin, defendant, a manifest error hath happened, to the great damage of the said John Riggin, defendant, as aforesaid, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this fifth day of May, in the year of our Lord one thousand eight hundred and seventy-one.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the districts of Missouri, dated as aforesaid.

AUSTIN DRAKE,
Clerk C. C. U. S. Missouri Districts.

Allowed by—

P. BLISS,
Pres'g Justice, &c.

32 STATE OF MISSOURI, *ss:*

I, Francis Minor, clerk of the supreme court, held at St. Louis, of the State of Missouri, in obedience to the mandate of the within writ, herewith transmit to the honorable Supreme Court of the United States, at Washington, a full, true, and complete transcript of the record and proceedings in the within-entitled cause, as fully as the same remain of record and on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office in the city of St. Louis, this twelfth day of August, A. D. 1871.

[SEAL.]

FRANCIS MINOR, *Clerk,*
Per J. F. BAIER, *D. C.*

(Indorsed:) John Magwire, D. E., vs. John Riggin, P. E. Writ of error. Filed May 8, 1871. Francis Minor, clerk, per Jos. F. Baier, D. C.

(Indorsement on cover:) No. 396. John Riggin, plaintiff in error, vs. John Magwire. Missouri sup. court. Filed 22 November, 1871.

IN THE

SUPREME COURT OF THE UNITED STATES.

IN ERROR FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

JOHN RIGGIN, *Plaintiff in Error*,
against
JOHN MAGWIRE, *Defendant in Error.*

STATEMENT OF THE CASE

By GLOVER & SHEPLEY, Counsel for Plaintiff in Error.

In 1839 John Riggin, plaintiff here (defendant below), conveyed to persons under whom the respondent (plaintiff below) acquired title, certain lands in the county of St. Louis by a deed which contained in it the words "grant, bargain and sell," which by the statute is a covenant that he was seized of an indefeasible estate in fee simple.

In 1843 the appellant was discharged from his debts by a certificate under the act of Congress approved August 19, 1841, entitled "An act to establish an uniform system of bankruptcy throughout the United States." (5 Stat. at Large, 440.)

In 1868 Margaret Thomas recovered judgment against the respondent Magwire, for a claim of dower upon the land so conveyed by Riggin, her husband having owned the land prior to the conveyance of Riggin, before Riggin acquired his title.

After having extinguished that claim by payment of the judgment of Mrs. Thomas against him, Magwire brought his suit against Riggin to recover from him the amount so paid. To this claim Riggin opposed his discharge in bankruptcy, obtained in 1843 under the act of 1841, as a complete bar.

The only question presented by this record, is whether that discharge is a good defense to the action. The cause was tried upon an agreed statement of facts, and the defendant asked the Court to declare that the defendant was entitled to judgment, which was refused, and judgment was entered for plaintiff.

ASSIGNMENT OF ERRORS.

The plaintiff, as grounds of error, assigns the following:

1st. In that the Supreme Court of the State of Missouri affirmed the judgment of the Court below, in favor of respondent.

2d. That the lower Court refused to give defendant's instruction.

3d. In that the said Court held that a discharge in bankruptcy granted the defendant (plaintiff in error here), under the act of 1841, was no bar to the claim of plaintiff.

BRIEF FOR RIGGIN, *Plaintiff in Error.*

The two sections of the bankrupt act of 1841, which bear upon this matter, are the 4th section (5 vol. U. S. Statutes at Large, 440), which provides that "a discharge and certificate, when duly granted, shall, in all Courts of Justice, be deemed a full and complete discharge of all *debts, contracts, and other engagements* of such bankrupt which are provable under this act, and shall

and may be pleaded as a full and complete bar," etc., and the 5th section, which provides that "all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, endorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts and claims under the act, and shall have a right, when these debts or claims become absolute, to have the same allowed them."

What, then, are the "debts, contracts and engagements" to which, as declared by the 4th section, the discharge is a bar? As we maintain, they are every "debt, contract and engagement" entered into by the bankrupt, except those debts, contracts and engagements of a *fiduciary* character, by the terms of the act excluded from the operation of the act. It is difficult to perceive why the word "*engagement*" was used, unless it was intended to include all instruments, agreements and liabilities upon which in any way a cause of action might arise. There has been no decision of the Supreme Court of the United States on the true construction of the provisions of this act, touching this matter, except in the case of sureties. There have been decisions in the courts of the different States holding different views as to whether, in such a case as this, the discharge operates as a bar, and in the Supreme Court of the State of Missouri there have been two decisions holding contrary views of the statute—one in the case of Shelton v. Pease, 10 Mo. 475, and the other in this case, 44 Mo. 512.

The controlling reason for the last decision seems to have been that in such a case as the one at bar, the party could possibly have no opportunity to come in and prove up his demand; that the "uncertain and contingent demands" mentioned in the act were those existing demands upon which the cause of action depends on a contingency, and did not include those the *existence* of which depended upon a contingency.

If this reasoning is sound, then none of the *enumerated* cases named in the 5th section should be amenable to these objections.

They must be cases in which the party could have opportunity to prove up his demand, and the existence of the demand did not depend upon a contingency.

Now let us take the enumerated case of a surety. There is no distinction made as to the kind and character of the suretyship. It, therefore, of necessity, includes every kind of suretyship. It includes not only a suretyship upon a moneyed demand, but a suretyship for one who had contracted for the performance of work and labor; for the rendering of any kind of service; for the abstaining from engaging for a certain period of time in certain pursuits; for the making good of any deficiency in accounts, or in the realization of a named sum; for indemnification, reaching on indefinitely. Here, clearly, are cases in which the *existence* of any demand is just as much a matter of contingency as in the case at bar, and the difficulty of establishing any liability before the Register just as great; but no distinction is made in the law as to the kind of suretyship, but all sureties must prove their demands, and a discharge is made a bar to all *claims* of this nature.

In the case of suretyship arising on a moneyed demand, the Supreme Court of the United States, in the case of Mace v. Wells, 7 Howard, 272, held that the discharge was a complete bar, without hesitation, and without any intimation that there was anything peculiar to it in the fact that it arose upon a moneyed demand which was not applicable to all cases of suretyship.

Take the case of the holder of a policy of insurance. It may be that an individual underwriter had made a policy upon a three years' voyage, and shortly after had gone into bankruptcy. Here is a case where there is no existing demand, for the existence of one depends first, upon a loss or damage to the vessel, and secondly upon it being a loss by one of the perils insured against, and then the proof could not be made for any specific sum; for no one could say, if a loss should occur from a peril insured against, whether it would be a partial or total loss.

The objections made would apply with still greater force to the holder of a life policy for ten or twenty years, for it could not be

said but that the party insured would live beyond the prescribed period, with the further objection that the existence of any demand could not be determined for perhaps ten or twenty years.

Therefore, all the objections which are urged against these covenants, as not coming within the class of "uncertain and contingent demands," apply with equal force to "demands or engagements" which are specially enumerated in the act as being those required to be proved.

The plain words of the act include all "uncertain and contingent demands" of every kind and character, and it will not do, in construing the meaning of the words used, to overlook the well known condition of the country at the time this law of 1841 was passed, and the expressed intention of applying the sponge to all past transactions of the bankrupt, except those of a fiduciary character. Not only are the *debts* of the bankrupt to be discharged, but all other "*contracts and engagements*," except those of a fiduciary character.

The very question now before the Court was considered by the Supreme Court of the State of New York in the case of Jemison v. Blowers, 5 Barb. 686, where a discharge was pleaded against a suit brought upon the covenant for quiet enjoyment, and after a careful examination of the act of 1841 the Court came to the conclusion that the discharge was a bar to the action. We beg leave to refer the Court to the reasoning in this carefully considered case, as well as to that of the Court in the case of Shelton v. Pease, 10 Mo. 475.

GLOVER & SHEPLEY,
for Plaintiff in Error.

IN THE

Supreme Court of the United States.

No. 161.—December Term, 1872.

JOHN RIGGIN,
Plaintiff in Error,
vs.
JOHN MAGWIRE.

In error to the Supreme Court of the State of Missouri.

Brief of Messrs. Blair & Dick, for the Defendant in Error.

STATEMENT.

On the 2d day of December, 1839, the plaintiff in error made his deed conveying to Vespasian Ellis a tract of land situate in the county of St. Louis, State of Missouri, in which deed, by the use of the words "grant, bargain, and sell," he made a covenant with the grantee, his heirs and assigns, of indefeasible seizin.—(Magwire vs. Riggin, 44 Mo., 512.)

On the 14th day of June, 1843, (p. 9,) Magwire, by virtue of conveyances by and under said Ellis, became owner of the land. Prior to the 2d day of December, 1839, one Martin Thomas was seized of an estate of inheritance in the same premises under a better title than

that of the plaintiff in error. Said Thomas died on the 13th September, 1848, leaving a widow who became entitled to dower in the premises, and recovered the same by suit in the year 1868 in the circuit court of the said county of St. Louis, and the defendant in error was compelled to pay the amount adjudged by said court to be the value thereof. To recover the amount so paid Magwire brought this suit against Riggin in the circuit court of St. Louis county on the 13th January, 1869. Among other defences relied upon in his answer Riggin alleged, and on the trial proved, that under, and by virtue of, "An act to establish a uniform system of bankruptcy throughout the United States," approved August 19, 1841, he had duly instituted a proceeding in the District Court of the United States for the District of Missouri, and was, by the decree of that court, on the 13th day of June, 1843, fully discharged from all his debts and liabilities. The circuit court gave judgment for the defendant in error, and the supreme court of the state, on the 8th of May, 1871, affirmed that judgment. Riggin brought the case here by writ of error. This decision involved the construction of the bankrupt act of 1841, and the decision of the state court is against "the exemption" claimed by the plaintiff in error under that act. Hence, the jurisdiction of this court to revise the action of the state court is unquestionable.

POINTS.

We claim that the decision of the state court was correct, and that the discharge of Riggin in bankruptcy did not discharge him from liability on the covenant to the defendant in error, because the liability did not exist at the date of the discharge—the dower right of Mrs. Thomas, from which the breach complained of here resulted, having accrued to her from the former seizin of her husband, who was living at the time of the discharge.

Magwire v. Riggin, 44 Mo., 512.
French v. Morse, 2 Gray, 111.
Bush v. Cooper, 26 Miss., 612.
Burns v. Williamson, 31 Miss., 537.

If defendant was discharged at all from the plaintiff's claim, it was by force of the fifth section of the act of 1841, providing for the proof against the bankrupt and his discharge from uncertain and contingent demands against him.

5 U. S. Stat. at Large, p. 444.

But the claim at bar is not such a demand.

Reed v. Price, 36 *Maine*, 460, *sup.* 463.

☞ See particularly page 463 of the above case.

Bennett v. Bartlett, 6 *Cush.*, 225.

Rawle says: "The liability of a covenantor will not 'be discharged by his bankruptcy with respect to such 'covenants as were not broken at that time."

Rawle on Cov., 3*d ed.*, *p.* 577.

Though, if there is a breach between the date of filing the petition and the discharge, it is released.

Rawle on Cov., 3*d ed.*, *p.* 577, *construing Jamison v. Blowers*, 5 *Barb.* (*N. Y.*), 686.

At the time of defendant's discharge in bankruptcy the claim of Magwire, in this case, was not an uncertain or contingent demand, but it was then a contingency whether there would ever be a demand.

This distinction between a contingent demand and a contingency whether there will ever be a demand, has been applied to the act of 1841 and become thoroughly established.

Reed v. Pierce, 36 Maine, 460.
Bush v. Cooper, 26 Miss., 612.
Woodward v. Herbert, 24 Maine, 358.
Goodwin v. Starkie, 15 N. H., 218.
3 Parson's Con., 5th ed., p. 505, note *f*.
Bennett v. Bartlett, 6 Cush., 225.

In *French v. Morse*, 2 *Gray*, 111, the court say that our opinion is that in the bankrupt act (1841) "uncertain or contingent demands" should be held to mean, not demands whose existence depends on a contingency, but existing demands upon which the cause of action depends on a contingency.—(p. 114.)

1 Smith's L C., 6th ed., pt. 2, pp. 1,135 et seq.

Mr. Hare, in his note to *Mills v. Auriol*, in respect of this act of 1841, says: "But many of the decisions take 'the more reasonable and practicable ground that so long 'as it remains wholly uncertain whether a contract or 'obligation will give rise to an actual duty or liability, 'and there are no means of removing the uncertainty by 'calculation, it will not be within the reach of a certifi-'cate of bankruptcy."—(1 *Smith's L. C.*, 1,137.) And again he says: "But to whatever length the law may go 'for the purpose of liquidating a contingent demand, it 'must necessarily stop short when the demand is not 'only uncertain in itself, but incapable of being reduced 'to certainty."—(Ib., p. 1,139.)

As an example of the distinction before referred to, it is held that although the liability of a surety for a debt is necessarily contingent until default is made by the principal debtor, yet his claim for indemnity will be defeated by the bankruptcy of the principal debtor, before the debt falls due, because the surety has the right of substitution and may even prove the debt in right of the creditor.

Mace v. Wells, 7 How., U. S., 272.
1 Smith L. C. (6 ed.), 1138.

On the other hand a surety upon the penal or official bonds of one, is entitled to indemnity, and the discharge of the principal in bankruptcy is no bar for after breaches, because the pecuniary obligation imposed by these instruments depends on a contingency which cannot be estimated.

Woodward v. Herbert, 24 Maine, 358.
Goodwin v. Starkie, 15 N. H., 218.
Dyer v. Cleveland, 18 Vt., 241.
Elles v. Ham, 28 Maine, 385.
Goss v. Gibson, 8 Humph., 197.
Loring v. Kendall, 1 Gray, 305.
Dole v. Warner, 32 Maine, 94.
French v. Morse, 2 Gray, 111–113.

Thus also the case of *Shelton v. Pease*, 10 *Mo.*, which was relied upon by Riggin as decisive of this case, was considered by our own court a case of a contingent demand under the act, and so distinguishable from the case at bar.

See 44 Mo., 512.

As this unbroken covenant of indefeasible seizin could not have been proved against the estate of Riggin in bankruptcy, his discharge is no defence to this claim. It could not be proved, because the right to prove was correlative with the right to a dividend, and there was no rule of damages for such a claim within the scope of calculation or conjecture.

See Magwire v. Riggin, 47 Mo.

M. BLAIR,
F. A. DICK,
for Defendant in Error.

FEBRUARY, 1873.